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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-774

BIG RIVERS ELECTRIC CORPORATION,
KENTUCKY POWER COMPANY and
KENTUCKY UTILITIES COMPANY,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
RUSSELL E. TRAIN, ADMINISTRATOR,
Respondents.

REPLY BRIEF OF PETITIONERS
TO
BRIEF FOR THE FEDERAL RESPONDENTS

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REPLY BRIEF OF PETITIONERS TO BRIEF FOR THE FEDERAL RESPONDENTS

This reply brief of Petitioners is addressed to arguments first raised in the Brief of the Federal Respondents in opposition to the petition of Tennessee Valley Authority for Certiorari (hereinafter referred to as "Respondents' Brief") which brief has been adopted by reference in the brief of Respondents filed in this case.

1. MOOTNESS IS NOT A QUESTION PRESENTED FOR CONSIDERATION IN CONNECTION WITH THIS PETITION FOR CERTIORARI.

On pages 6 through 8 of Respondents' Brief it is pointed out that the Kentucky agency, prior to the hearing in the Sixth Circuit Court of Appeals, eliminated the alternate control strategy provision which was disapproved by the Federal Administrator from its regulations. Both Kentucky and the Federal Respondents moved to dismiss the Petition for Review, but the Appellate Court denied the motion and decided the case on the merits.

Whether the Court of Appeals was right or wrong in its decision on the mootness issue, mootness is not a question presented for consideration in connection with this Petition for Certiorari. Petitioners do not contest the decision on mootness and there has been no cross petition for certiorari on that issue. Irrespective of the correctness of the decision on the mootness issue, that decision on the merits decided important questions of federal law which will continue into the future to have a nationwide effect of great social and economic importance. The only way that these issues can be finally resolved is for the Supreme Court to grant the Petition for Certiorari.

2. THE SIXTH CIRCUIT COURT OF APPEALS DECISION IS NOT CORRECT ON THE MERITS.

Respondents argue that the Sixth Circuit Court of Appeals decision is correct on the merits and does not conflict with any decision of this court or any court of appeals. (Respondents' Brief, p. 8). Petitioners assert that the decision is not correct on the merits. Also, even though the Supreme Court did not decide the issues involved in this

case in *Train v. NRDC,* 421 U.S. 60 (1975), the legal principles laid down in that case in regard to variances should be applied to alternate control strategies such as were authorized by the Kentucky Implementation Plan. Such application would require that the Court of Appeals decision be set aside. This correction can be made by the granting of the writ.

a) It is Respondents' position that every court that has considered the language of Section 110(a)(2)(B) of the Clean Air Act has construed it to require the use of all available measures for continuous limitation of emissions. (Respondents' Brief, p. 9). The Fifth Circuit decision in *Natural Resources Defense Council, Inc. v. Environmental Protection Agency,* 489 F.2d 390 (5th Cir. 1975) is cited as one such case. Petitioners have pointed out (Petition, pp. 7-8) that only the variance portion of that case was appealed to the Supreme Court, and one of the purposes of this petition for certiorari is to enable this court to complete the picture by deciding the emission regulation as well. If this court had applied the same legal doctrine announced in *Train v. NRDC,* 421 U.S. 60 (1975) to the second issue in the Fifth Circuit case as it did to the variance issue, the entire Fifth Circuit decision would have been reversed. If the state has the right, as declared in the *Train* case, to choose its own mix of emission limitations to meet its particular situation, "so long as the ultimate effect * * * is compliance with the national standards for ambient air" (421 U.S. 60 at 79), then the emission limitations in the Fifth Circuit case as well as the alternate control strategy in the Kentucky plan should have been approved. The foregoing error of the Fifth Circuit was perpetuated in the case of *Kennecott Copper Corporation v. Train,* No. 75-1335 — F.2d — (9th Cir. 1975, Petition for Certiorari pending) cited by Respondents on p. 8 of

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their brief. That case, relying in part on the Fifth Circuit case, erroneously construes the Clean Air Act and denies the state the right to choose its own mix of emission limitations. It did, however, recognize that so called constant emission controls could not be required "unless it were economically feasible to do so" (Slip Opinion, p. 12). The spread of the error of the Fifth Circuit decision emphasizes the need for this court to clear up the entire matter by granting certiorari in this and the *Kennecott* case.

Petitioners have already answered Respondents' argument set forth on p. 9 of their brief that the definition of emission limitations in the *Train* case justified the disapproval of the alternate control strategy in the Kentucky plan. (Petition, pp. 7-8). There are numerous alternate control strategies which regulate the composition of substances such as sulfur dioxide, emitted into the ambient air and hence, the portion of the Kentucky plan which would have permitted such strategies should not have been disapproved. (Petition, pp. 11-12).

b) The purpose of the Clean Air Act would not be violated by the alternate control strategy of the Kentucky Implementation Plan as claimed by Respondents on pages 10 through 12 of their brief. In the *Train* case, this court recognized that the purpose of Section 110(a)(2)(B) of the Act was to achieve the national standards for ambient air. "Thus, so long as the ultimate effect of the State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation", 421 U.S. at 79. The ambient standards are the ones which are to protect health and general welfare. *If they are not exceeded such protection will be achieved whether or not the emission limitation takes into account dispersion or intermittent re-*

duction. If it is found as a matter of fact that any particular alternate control strategy will cause a failure to meet or maintain the ambient standards, then it is a defect in that particular strategy which would justify its disapproval. The state should not be denied its right to choose its own mix of emission limitations so long as ambient standards are met. Meeting such standards was one of the conditions of the Kentucky alternate control strategy.

Certain assumptions made by U.S. EPA in regard to intermittent control strategies are erroneous and show the lack of understanding by the agency of an electric utility's operation. The EPA staff paper cited in footnote 1, (Respondents' Brief, pages 3 and 4) asserts that "if plant operation is curtailed during poor dispersion conditions, then it may be increased during good conditions to make up for the lost production. Average emissions would be about the same with or without [an intermittent control system] for this situation." A similar statement relating to copper smelters is quoted from the case of *Kennecott Copper Corporation v. Train,* No. 75-1335 — F.2d — (9th Cir. 1975) at page 11 of Respondents' Brief. This type of conjecture has no application whatsoever to an electric generating plant because the demand for electricity is instantaneous in nature and therefore must be supplied on an instantaneous basis. There is no such thing as making up lost production of electricity. If it is necessary to secure power from other sources to make up a curtailment of a particular generator on one day, the demand for power the next day to be met by the generator which was curtailed will not be one bit more because of the securing of additional power the day before. Thus, in fact, there always would be a net reduction of emissions. The second concept contained in the EPA staff paper cited in footnote 1 on pages 3 and 4 of Respondents' Brief is equally inapplicable to an electric utility. The staff paper claims that:

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> "If clean fuel is used to reduce emissions during poor dispersion conditions, then average emissions will be reduced somewhat. If fuel with higher sulfur content is used during good conditions, then average emissions could be greater with [an intermittent control system].* * * "

For example, under an intermittent control strategy, a utility might be permitted to burn coal with a 3% sulfur content during ordinary conditions because the emissions resulting from such limitation would enable the achievement and maintenance of the ambient sulfur dioxide standards, but would be required to burn coal with a 1% sulfur content during certain meteorological conditions. When the meteorological conditions disappeared, the utility would have to go back to the same 3% coal it was previously burning. There would be no reason in the intermittent control strategy to allow burning of a higher sulfur coal nor would there be any incentive to do so. Hence, there would be an overall reduction in the average emissions.

Respondents also confuse the relevancy of the non-degradation policy of the Act. (Respondents' Brief, p. 12.) The case which Petitioners seek to have this court review deals with the right of a state to choose its own mix of emission limitations by way of alternate control strategies *to meet ambient standards.* If, as a *matter of fact, peculiar to a particular location,* it would be found that a *particular* strategy would result in the degradation of an exceptionally pure air area, then it is that particular situation which should be given special consideration rather than take away the entire right of the state to adopt its own mix. To do otherwise would be a classic example of putting the cart before the horse. If, for example, alternate control strategies will enable the ambient standards to be met and

maintained in 99% of the area of the state, they should not be ruled out because such strategy might not be desirable in 1% of the area of the state. It is the 1% which should receive special attention. Otherwise, many hundreds of millions of dollars of needless expense would have to be borne by the people of the state for overkill in 99% of the state.

c) The subsequent legislation dealing with converting certain large sources from oil or gas to coal does not support Respondents' contention that it declares the intent of Congress as to the earlier statute to prohibit states from choosing alternate control strategies. (Respondents' Brief pp. 12-16.) The Energy Supply and Environmental Coordination Act of 1974, referred to by Respondents, deals with a situation where an existing source is not presently a significant source of certain pollutants because it is burning a clean fuel such as natural gas and proposes to convert to a fuel which will thereafter result in new emissions which are designated as pollutants. In other words *a new cause of pollution* will come into being. A modified "new source" philosophy is applied by The Energy Act. Instead of having to immediately achieve compliance, such as would be the case of the usual new source, temporary relief is granted (to make the switch practicable) but the ultimate requirement is for strict compliance with the applicable emission restrictions.

The Conference Report of the Joint Committee of the Senate and House on the Energy Supply and Environmental Coordinator Act expressly recognizes that the Act is dealing with a *new* air pollution threat. The report states:

> "* * * In the judgment of the conferees, the Administrator of EPA should be authorized to assure

> that orders prohibiting the burning of petroleum products or natural gas under section 2(a) of the Energy Supply and Environmental Coordination Act *would not create major new air pollution threats to health,* exacerbate existing serious threats to health as a result of the increased emission of such presently unregulated air pollutants, or prevent sources of such pollutants from reducing a significant risk to health."
>
> (Conference Board No. 93-1085 "Joint Explanatory Statement of the Committee of Conference", U. S. Code Congressional and Administrative News, Volume 2, 93rd Congress Second Session 1974, page 3314. Emphasis added).

The Clean Air Act clearly recognizes the difference between new sources and existing sources and treats new sources in a more restrictive manner. The fact that Congress subesquently provides only for temporary use of intermittent controls in what it treats as a *new cause of pollution* can in no way be an argument that states are obligated to indulge in unreasonable overkill by establishing a single emission standard for all existing sources. The separate treatment of these existing sources is expressly limited by the Clean Air Act to meeting and maintaining the ambient standards. This is the very thing which Kentucky's alternate control strategy required. Senator Muskie's after the fact attempt (see quotation on p. 15 of Respondents' Brief) to express his *personal* philosophy as to how the Clean Air Act (passed several years earlier) should be interpreted, can hardly be given any value as legislative history or intent.

CONCLUSION

The misinterpretation of the Clean Air Act which is evident in Respondents' Brief is a strong argument why it is important that this Court grant the Petition for Certiorari in this case and clear up these important questions for the regulator and the regulated.

Respectfully submitted,

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